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No. 10-1058

In the
Supreme Court of the United States

YANKTON SIOUX TRIBE, AND ITS INDIVIDUAL MEMBERS,
Cross-Petitioners

v.

DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA, MARTY J. JACKLEY, ATTORNEY GENERAL OF SOUTH DAKOTA, SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT, PAM HEIN, STATE'S ATTORNEY OF CHARLES MIX COUNTY, ET AL.,
Cross-Respondents

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF

DARYL L. JOSEFFER
CANDICE CHIU
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500

PAUL D. CLEMENT
Counsel of Record
BANCROFT PLLC
1919 M St., NW, Ste. 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

Counsel for Cross-Petitioners

May 31, 2011 * additional counsel listed on inside cover

WILSON-EPES PRINTING CO., INC. · (202) 789-0096 – WASHINGTON, D.C. 20002

RICHARD A. GUEST
NATIVE AMERICAN RIGHTS FUND
1514 P Street NW
Suite D
Washington, DC 20005
(202) 785-4166

CHARLES ABOUREZK
ABOUREZK & ZEPHIER, P.C.
P O. Box 9460
2020 W. Omaha Street
Rapid City, SD 57709
(605) 342-0097

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REPLY BRIEF OF CROSS-PETITIONERS

1. For the reasons already explained in the Tribe's brief in opposition and conditional cross-petition, this Court should deny all of the petitions in this case. The questions presented are fact-bound, and do not implicate any clear splits in authority. And while the reservation's very existence has crucial cultural significance to the Tribe, questions concerning the existence or extent of this particular reservation have very limited practical significance to all others. All lands currently recognized as being within the reservation are Indian country for additional reasons beyond their reservation status — and are thus subject to federal and tribal jurisdiction no matter how this Court might rule on the questions presented. Moreover, all affected parties have reached practical accommodations to the realities on the ground over the past decade, demonstrating that further review is not needed and would, instead, serve only to destabilize a now-stable situation. YST Opp. 23-32; U.S. Opp. 24-30.

Those conclusions are only confirmed by petitioners' continued focus on lands that, they admit, the court of appeals did *not* consider. *E.g.*, County Resp. 24-35. While petitioners and their *amici* are not shy about expressing frustrations with the Tribe, the United States, and the decision below, they still have not been able to identify any significant practical consequence from the court of appeals' actual decision. And apart from the cultural importance of the reservation to the Tribe, there is none. YST Opp. 23; U.S. Opp. 24.

All that said, if this Court were to grant the petitions in Nos. 10-929, 10-931, and 10-932, it clearly should *also* grant the conditional cross-petition. The petitioners in all three of those actions concede that granting the conditional cross-petition would be the appropriate course, in order to ensure that this Court is not procedurally constrained from considering the "full range of arguments" about congressional intent. State Resp. 1; *see also* County Resp. 1; Dist. Resp. 1. And if this Court is going to grant plenary review to consider the status of this one, particular reservation, it certainly should consider the status of the entire reservation and have available to it the full range of remedial options.

2. As explained in the conditional cross-petition, the 1894 Congress must have intended one of three things: (1) to diminish the reservation to the extent of the lands ceded to the United States in 1894 (the Tribe's view); (2) to diminish the reservation to that extent *and* further to the extent that non-ceded lands later passed into non-Indian hands (the court of appeals' view); or (3) to disestablish the reservation completely (petitioners' view). If this Court were to grant certiorari in No. 10-929, 10-931, or 10-932, the latter two theories would be squarely before it. Granting the conditional cross-petition would merely avoid any procedural obstacle to reaching the other possible conclusion about congressional intent. YST Cross-Pet. 15.

Moreover, the questions presented in the petitions and the conditional cross-petition all turn on analysis of the same indicia of congressional

intent. YST Cross-Pet. 12-15. The Tribe has shown that express provisions in the 1894 Act, express statements in the negotiation records, and the legislative history support diminishment only to the extent of the ceded lands, and no further. *Id.* The Eighth Circuit likewise relied on the "text of the 1894 Act, read in its full historical context" in adopting its middle ground. Pet. App. 243. And while petitioners generally ignore the historical context of the 1894 Act, they too rely heavily, albeit inaccurately, on the text of the Act. *E.g.*, State Resp. 6.

Indeed, petitioners' responses to the conditional cross-petition aptly illustrate the extensive factual overlap between the petitions and the conditional cross-petition by rehashing the very same merits arguments they advanced in their petitions. *Compare, e.g., id.* at 5-14, *with* State Pet. at 22-30. It would make little sense for this Court to grant the petitions, and consider the parties' arguments about the same evidence of congressional intent, but preclude itself from drawing one of the three possible conclusions about that intent.

Although the United States (unlike the petitioners) recommends denial of the conditional cross-petition, it emphasizes its primary conclusion (with which the Tribe is in full agreement) that the petitions should be denied and gives no valid reason to deny that cross-petition in the event that the Court disagrees with the United States and grants the other petitions. The United States correctly notes that, "[l]ike the disestablishment issue presented by petitioners, the issue the Tribe raises involves only the application of settled law to this

particular case" in a "fact-bound ruling." U.S. Opp. 31. But that is a reason to deny *all* of the petitions, not to deny the fact-bound conditional cross-petition in the event that the Court grants the intimately-related fact-bound principal petitions. *See* YST Opp. 11-15.

The government further observes that the court of appeals' middle-ground decision "essentially preserves the jurisdictional status quo as it has long existed." U.S. Opp. 31. That is yet another excellent reason to deny *all* of the petitions. *See* YST Opp. 31-32. But it is no reason to deny only the conditional cross-petition, in the event the Court decides to reconsider the long-prevailing status quo.

3. Although petitioners acknowledge that this Court should grant the conditional cross-petition if it were to grant one or more of the other petitions, they argue the merits at length. Indeed, petitioners and their *amici* essentially treat the conditional cross-petition and the related hold petition in No. 10-1059 as opportunities to file additional briefs on the merits of their own petitions. *See, e.g.*, Charles Mix County *Amicus* Br., No. 10-1059; S. Mo. Recycling & Waste Management Dist. *Amicus* Br., No. 10-1059. That only confirms the interrelationship of the petitions and thus the need to grant the conditional cross-petition if the Court were to grant the principal petitions. Petitioners' merits discussion also underscores the fact-bound nature of the questions

presented, and thus the reasons to deny all of the petitions.[1]

a. The Tribe already addressed most of the petitioners' merits arguments in its brief in opposition, and will not belabor those points here. In an attempt to make the issues appear less factual, however, petitioners continue to advance arguments that cannot be squared with this Court's precedents. Most notably, petitioners rely heavily on a supposed "presumption of *disestablishment*," County Resp. 5 (emphasis added) — a presumption that simply does not exist. In particular, petitioners fixate on provisions of the 1894 Act in which the Tribe ceded its unallotted lands for a "sum certain," and treat those provisions as somehow controlling over all of the other textual and contextual evidence. *E.g.*, State Resp. 6.

As the Tribe and the United States have already explained, however, this Court has held only that cession of unallotted lands for a sum certain creates a presumption of *diminishment* with respect to *those* lands; it in no way creates a further presumption of total disestablishment. *See* YST Opp. 16-17; U.S.

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[1] While the United States does not expressly address the merits of the conditional cross-petition, its analysis is fully consistent with its longstanding agreement with the Tribe that the "court of appeals erred in holding that the Yankton Sioux Reservation has been progressively diminished as formerly allotted lands have passed into non-Indian hands." U.S. Br. in Opp., Nos. 99-1490 and 99-1683, at 8; *see also* U.S. CA8 Br., *Podhradsky*, at 24-25 n.9 ("*Gaffey* ruling was in error in .. [finding] intent to diminish the Reservation beyond the loss of the ceded unallotted lands").

Opp. 14 n.3. Nor should it; the Tribe did not cede the other reservation lands, or even a majority of those lands, much less do so for a sum certain. Far from "ignor[ing]" the "cession" language, State Resp. 6, the Tribe embraces it; that language delineates the extent of the diminishment (*i.e.*, diminishment only to the extent of the ceded lands).

The County's efforts to portray the presumption of diminishment as being one of disestablishment only underscore its error. For example, the County quotes a 1934 Interior Department opinion at length for the proposition that "Indians lost all identity *with the ceded areas* and their rights and interests *therein* were recognized as having been completely extinguished." County Resp. 10 (emphases in original; others omitted); *see also* Charles Mix County *Amicus* Br., No. 10-1059, at 3 ("ratification of a cession agreement would extinguish the Tribe's claim or title *to the affected area*") (emphasis added). Exactly — cession of ceded areas altered the reservation status of those ceded lands, not of others.

Petitioners similarly argue that this Court should disregard the other *18* articles of the Act as mere "subsidiary" language (State Resp. 6), even though every statute must be read as a whole and even though this Court carefully considered a number of those articles in its earlier decision in this litigation. This Court's careful attention to other provisions that "contradict[]" and "counsel[] against finding the reservation terminated," *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 350 (1998), would be inexplicable if every provision but the cession provisions were insignificant.

Petitioners' reliance on different agreements concerning different Tribes and different reservations with purportedly "similar" provisions, *see* State Resp. 8-10, likewise fails because the notion "'that similar language in two Treaties involving different parties has precisely the same meaning' is the very assumption that this Court has dismissed as 'a fundamental misunderstanding of basic principles of treaty construction.'" YST Opp. 17-18 (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999)).[2] In particular, the mere fact that *DeCoteau v. District County Court*, 420 U.S. 425 (1975), involved the "cession" of lands and found disestablishment does not compel a finding of disestablishment here, because there are significant differences between this case and *DeCoteau*. *See* YST Opp. 17-19; U.S. Opp. 20-24.

b. For those reasons, the issues here turn on the unique factual record concerning the 1894 Act and its historical context. With respect to the Act, petitioners simply rehash interpretations of Articles V, VIII, and XVII that have already been squarely refuted by this Court, the Eighth Circuit, the district

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[2] For example, there are significant differences between the Yankton act and Nez Perce act, notwithstanding one *amicus*'s strained efforts to deem them "twin[s]." *Cf.* Lewis County *Amicus* Br., No. 10-1059, at 7. The Nez Perce act contains neither of the features that this Court found to contradict disestablishment in *Yankton*: a reservation of agency trust lands and a liquor prohibition that draws a jurisdictional distinction between reservation and ceded land. *See Yankton*, 522 U.S at 350.

court, or all three. Notwithstanding petitioners' continued protestations, *see* State Resp. 8, this Court made clear 13 years ago that Article VIII, concerning the agency trust lands, "counsels against finding the reservation terminated," and that Article XVII, concerning liquor sales, drew a "jurisdictional distinction between reservation and ceded land." *Yankton*, 522 U.S. at 350. Both the Eighth Circuit and the district court further found that Article V, concerning tribal courts and other local institutions, likewise "signals congressional intent consistent with the continuing reservation status of the allotted lands and an intent to preserve tribal self-government." Pet. App. 292; *see also id.* at 239.[3]

In addition to disputing those determinations, petitioners pointedly ignore the context of the negotiations and legislation. That context strongly supports the Tribe by showing that the Commissioners, the Tribe, and Congress focused on the unallotted acres, and had no intent to disturb the remainder of the reservation. YST Cross-Pet. 13-15; YST Opp. 14. Petitioners' sole response is that the Eighth Circuit's acknowledgement that "'the Commission's reports do not describe any

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[3] The State asserts that Article XVII would only have been necessary if the reservation was disestablished because "liquor had been illegal in Indian country since 1832." State Resp. 10. In fact, as the district court found, "Congress outlawed the sale of intoxicating liquor in Indian Country on July 23, 1892" and there was "no indication in the Commissioners' reports that either party was aware of the liquor statute when the Agreement was reached" relatively shortly thereafter Pet. App. 304 (citing 27 Stat. 260).

reservation boundaries'" somehow "undermines the claims of the Tribe." County Resp. 24 (quoting from Pet. App. 236). But the reservation already existed; the absence of any description of reduced or eliminated boundaries only *supports* the conclusion that Congress intended to diminish the existing reservation only to the extent of the ceded lands, and no further. *See* Pet. App. 237. Otherwise, Congress presumably would have explained what further change in boundaries it had in mind.

Apart from disputing this Court's prior reading of the Act and ignoring the compelling historical context, petitioners recycle a number of arguments from their petitions that the Tribe and the United States already addressed at length in their briefs in opposition. For instance, it is not the case that the retention of "tribal land in common" is a prerequisite to reservation status. *See* YST Opp. 19-20; *cf.* State Resp. 11. Nor does the "tribal ownership" in question refer to lands owned by the Tribe itself, as opposed to "lands in which the Indians held some form of property interest" such as "trust lands" and "individual allotments." *Solem v. Bartlett*, 465 U.S. 463, 468 (1984).

It is also unfair to suggest that the post-enactment history reflected a settled understanding of disestablishment. *See* YST Opp. 19; U.S. Opp. 13-14; *cf.* State Resp. 14. Indeed, it was only after the State intervened in the Tribe's modest effort to respond to the imminent construction of an unlined waste site that this litigation transmogrified into an existential challenge to the entire Yankton Sioux Reservation.

4. Lacking a strong merits argument, petitioners make a number of practical assertions that the Tribe already refuted in its brief in opposition. Upholding the Tribe's position would not "radically alter" jurisdictional treatment of non-Indians, as this Court has already imposed strict limits on tribes' authority over non-members. *See* YST Opp. 27-28; *cf.* State Resp. 13. It is especially inaccurate to describe the diminished reservation configuration as "unknown to Indian law," State Resp. 4, when non-contiguous, checkerboarded reservations abound. *See* YST Opp. 30-31. And it is pure speculation to ponder the implications of the decision below on post-1948 fee lands when the court of appeals declined to consider those lands because they were not properly before it. *See* YST Opp. 28-30; *cf.* County Resp. 24-34.

For present purposes, the point is a simple one: none of the fact-bound petitions warrants further review, but if this Court were to grant one or more of the principal petitions, it should also grant the conditional cross-petition so that the Court would not face any procedural obstacles to deciding the case in accordance with its own view of congressional intent.

CONCLUSION

This Court should deny the petitions for a writ of certiorari in Nos. 10-929, 10-931, and 10-932. But if this Court were to grant one or more of those petitions, it should also grant this conditional cross-petition.

Respectfully submitted,

Richard A. Guest
NATIVE AMERICAN RIGHTS FUND
1514 P St. NW, Ste. D
Washington, DC 20005
(202) 785-4166

Paul D. Clement
Counsel of Record
BANCROFT PLLC
1919 M St. NW, Suite 470
Washington, DC 20036
(202) 234-0090

Charles Abourezk
ABOUREZK & ZEPHIER, P.C.
P.O. Box 9460
2020 W. Omaha Street
Rapid City, SD 57709
(605) 342-0097

Daryl L. Joseffer
Candice Chiu
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500

Counsel for Cross-Petitioners

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